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BEFORE THE

**Federal Communications Commission**

APR - 9 1993

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of ) MM Docket No. 93-26  
STEVEN L. GRADICK ) File No. BPH-911031MD  
TERRY C. JENKS ) File No. BPH-911031MF

For Construction Permit for a  
New FM Station in Bowdon, Georgia

Directed to: The Honorable Richard L. Sippel  
Administrative Law Judge

**MOTION TO ENLARGE ISSUES**  
**SUMMARY**

Herein, Terry C. Jenks (Jenks) moves that the issues in this proceeding be enlarged to include an abuse of process issue against Steven L. Gradick (Gradick). On March 26, 1993, Gradick filed a Motion to Modify Issues (Motion) in this proceeding that contained false and misleading statements unsupported by any documentation, that withheld relevant information, and that misrepresented the status of matters pending at the Commission. In his Motion, Gradick made statements either knowing them to be false or with a reckless disregard for truth in this proceeding.

Thereafter, on April 2, 1993, Gradick filed a Supplement to Motion to Modify Issues (Supplement). In the Supplement, Gradick stated that he had "discovered" the existence of two Commission letters, both of which pre-date his Motion. Although the letters reflect that the Mass Media Bureau has already investigated the allegations against Jenks raised in the Gradick Motion and found them to be unsubstantiated, Gradick has not withdrawn his Motion

or corrected misstatements in the Motion as to the status of proceedings at the Commission.

As Jenks demonstrates, Gradick withheld relevant information and filed a Motion for which there was no reasonable basis. The Motion recklessly includes serious allegations against persons not even a party to this proceeding, despite the fact that the Commission already investigated the allegations and terminated its investigation with the conclusion that no further action was warranted. Gradick's filing of the Motion and permitting it to remain on file constitute abuse of the Commission's processes.

As Jenks demonstrates herein, an abuse of process issue is warranted and necessary to determine whether Gradick is basically qualified to be a Commission licensee.

TABLE OF CONTENTS

Summary.....	i
Table of Contents.....	iii
I. Introduction.....	1
II. Background.....	2
A. Gradick's Motion.....	2
B. The Allotment Proceeding.....	4
C. The Mass Media Bureau Investigation.....	7
III. Gradick's Conduct Constitutes An Abuse of Process.....	9
A. Gradick Withheld Relevant Information.....	9
B. There Was No Reasonable Basis For The Motion....	12
C. An Issue Should Be Added To Examine Gradick's Willingness To Abuse The Commission's Processes.	13
IV. This Motion Satisfies The Requirements Of Section 1.229 Of The Rules.....	15
A. Timing.....	15
B. Support.....	15
C. Discovery.....	16
D. Forfeiture.....	17
V. Conclusion.....	17
Attachments	
January 29, 1992 Letter.....	1
November 17, 1992 Letter.....	2
February 10, 1993 Letter.....	3
AMCC Petition for Reconsideration.....	4
Definitions And Instructions For Document Production.....	5

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**MOTION TO ENLARGE ISSUES**

Terry C. Jenks (Jenks), by his attorneys and pursuant to Section 1.229(b)(3) of the Commission's Rules, hereby respectfully moves that the issues in this proceeding be enlarged to include the issue set forth below to be specified against Steven L. Gradick (Gradick). In support whereof, the following is submitted:

**I. INTRODUCTION**

On March 26, 1993, Gradick filed a Motion to Modify Issues (Motion) in this proceeding that did not meet any of the requirements of Section 1.229 of the rules (except that it was timely filed),<sup>1</sup> that contained false and misleading statements unsupported by any documentation, that withheld relevant

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<sup>1</sup>While styled as a motion to modify the issues, the Gradick Motion was in reality an unauthorized petition for reconsideration of the Hearing Designation Order in this proceeding. No issues were requested in the Motion, and no suggested modifications of the existing issues were offered therein.

information, and that misrepresented the status of matters pending at the Commission.

In his Motion, Gradick made statements either knowing them to be false or with a reckless disregard for truth in this proceeding. For the reasons stated below, the following issue should be specified against Gradick in this proceeding:

To determine whether Steven L. Gradick has abused the Commission's processes in filing his Motion to Modify Issues and/or his Supplement to Motion to Modify Issues, or in failing to withdraw those filings, and, if so, the effect thereof on the basic qualifications of Steven L. Gradick to be a Commission licensee.

## **II. BACKGROUND**

### **A. GRADICK'S MOTION**

In his Motion to Modify Issues, filed on March 26, 1993, Gradick moved that the issues in the above-captioned proceeding be modified to condition any grant to Jenks "on the outcome of pending proceedings before the FCC." The two pending proceedings alleged were: (1) a Petition for Reconsideration of the Report and Order allotting Channel 288A to Bowdon, Georgia, in MM Docket No. 90-309, filed on September 19, 1991, by Design Media, Inc. (Design), a copy of which was submitted as Exhibit 1 to Gradick's Motion; and (2) a Request for Commission Inquiry filed on September 26, 1991, also by Design. With respect to the Request for Commission Inquiry, Gradick stated as follows:

"This Request for Inquiry was filed September 26, 1991 by Design Media, Inc. ("DMI"), and is presently pending before the Commission. The Request for Inquiry is premised upon the

same conduct that was alleged in the Petition for Reconsideration."

Gradick Motion at 2 (emphasis added). Gradick also stated that the allegations contained in the Petition were serious and that, "[i]f the Commission acts favorably on the Petition for Reconsideration, it would have to make findings adverse to Mr. Jenks." Id. (emphasis added). Gradick also asserted that the above matters were "pending and that there have been no determinations concerning the sufficiency of the allegations or the legal efficacy of the arguments for reconsideration...." Id. at 3 (emphasis added). Gradick submitted, as his sole support for the Motion, one pleading, the Design Petition for Reconsideration, from a docket (MM 90-309) that includes 45 entries. Gradick did not submit any of the responses to the Petition for Reconsideration or the Request for Commission Inquiry or even acknowledge that responses were filed.

More importantly, as Jenks has demonstrated in his Opposition to Motion to Modify Issues, filed April 7, 1993, contrary to the allegations in Gradick's Motion, the Request for Commission Inquiry was no longer pending at the Commission on March 26, 1993. Contrary to the allegations in the Gradick Motion, the Commission's Mass Media Bureau had already fully investigated the allegations of misconduct that were raised against Jenks by Design in its September 19, 1991 Petition for Reconsideration. Contrary to the allegations in Gradick's Motion, there had been a determination as to the sufficiency of

the allegations in the Design Petition for Reconsideration. Contrary to the allegations in Gradick's Motion, the Mass Media Bureau, after an investigation that lasted over a year, did not find any evidence of any wrongdoing by Terry Jenks. Contrary to the allegations in Gradick's Motion, the Commission could reconsider the Report and Order allotting Channel 288A without making findings adverse to Mr. Jenks.

It is apparent that Gradick filed his Motion, not with any good faith belief in the merits thereof but in an effort to require Jenks to spend time and resources defending himself and to raise suspicions about Jenks in this proceeding. It is possible that Gradick had other improper motives as well. It is clear that Gradick's conduct constitutes an abuse of process.

#### **B. THE ALLOTMENT PROCEEDING**

Channel 288A was allotted to Bowdon in the Report and Order in MM Docket No. 90-309, Table of Allotments, FM Broadcast Station (Bowdon, Griffin, Hogansville, and Sparta, Georgia)  
(Report and Order) 6 FCC Rcd 4862 (MM Dkt. 1001) As the



(BBI); however, BBI thereafter reached a settlement agreement with Design whereby BBI would be paid one sum to seek dismissal of its counterproposal and an even greater sum if Mr. Jenks would also dismiss his counterproposal. Despite intense pressure from Design and from BBI, Mr. Jenks did not dismiss his counterproposal. The Report and Order made the allotment to Bowdon, as Jenks had proposed. In retaliation, Design launched a bitter attack against Jenks and others, beginning with its Petition for Reconsideration, filed on September 19, 1991.

Both Design and AMCC filed petitions for reconsideration of the Report and Order, and both petitions remain pending.<sup>2</sup> In addition to its Petition for Reconsideration, Design filed a Petition for Stay, on September 23, 1991, seeking a stay of the opening of the window for Bowdon, pending action on its Petition for Reconsideration. No stay was granted, which strongly suggests that the Commission concluded that the requirements for a stay (including likelihood of success on the merits) were not present.

Design also filed the above-referenced Request for Commission Inquiry, on September 26, 1991, which relied solely upon Design's Petition for Reconsideration. Also on September

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<sup>2</sup>Curiously, Gradick's Motion also withheld mention of the Petition for Reconsideration filed by AMCC, a copy of which is attached hereto as Attachment 4. The AMCC Petition for Reconsideration did not raise any allegations against Terry C. Jenks, but rather was limited to technical and other allocation policies. Gradick's failure to discuss or acknowledge the AMCC Petition for Reconsideration also raises questions as to Gradick's good faith.

26, 1991, Design filed an Application for Review of the approval of a settlement agreement in a proceeding unrelated to Bowdon, Georgia, or Terry Jenks but related to a member of Dallas Tarkenton's family. The Commission's Review Board dismissed Design's Application for Review by Memorandum Opinion and Order in MM Docket 91-184. See Stephen D. Tarkenton, 7 FCC Rcd 1357 (Rev. Bd. 1992). Review Board Chairman Joseph A. Marino issued a Concurring Statement directed specifically to Design's conduct

and involving parties unknown to Mr. Jenks.<sup>3</sup> They raise serious allegations about the conduct of Dallas M. Tarkenton and his sons in the handling of their own applications and reports to the FCC -- matters that have no relevance to this proceeding. For this reason alone, Gradick should have exercised extreme caution before submitting the Design Petition for Reconsideration in the instant proceeding.

The Design Request for Commission Inquiry and Petition for Reconsideration were opposed by Dallas M. Tarkenton, Gleamer Lee Smith, and Terry C. Jenks, the three individuals attacked by Design in the Petition for Reconsideration. Gradick's Motion did not include copies of the responsive pleadings, which clearly and easily refuted Design's allegations with respect to Jenks.

#### **C. THE MASS MEDIA BUREAU INVESTIGATION**

On January 29, 1992, more than a year ago, the Chief of the Enforcement Division of the Mass Media Bureau sent a letter addressed to counsel for Dallas M. Tarkenton. A copy of this letter is submitted as Attachment 1 hereto. The letter is in direct response to Design's Request for Commission Inquiry and specifically notes that it has considered the responses of Dallas Tarkenton, Gleamer Lee Smith, and Terry C. Jenks thereto. In the letter, the Chief of the Enforcement Division notes that the Commission generally has not ordered an inquiry absent some

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<sup>3</sup>Mr. Jenks has previously demonstrated to the Mass Media Bureau that he had no knowledge of any of the conduct alleged against the Tarkentons and that he did not know, had never met, and had never even spoken with any of the Tarkentons.

actual basis for believing that either the Communications Act or its rules have been violated. The letter notes that Design's accusations against Jenks "are not substantiated" and that the Bureau was unable "to find the existence of any 'crucial link' between Jenks and Tarkenton." (Emphasis added.) The Bureau found nothing to substantiate the allegations raised by Design against Jenks.

The Bureau did, however, have some unanswered questions of Dallas M. Tarkenton concerning conduct raised in the Design Petition for Reconsideration and Request for Commission Inquiry that had nothing whatsoever to do with Terry C. Jenks. The Bureau asked for additional information from Dallas Tarkenton. Dallas Tarkenton responded to the Bureau's letter on February 18, 1992.

On November 17, 1992, the Chief of Enforcement Division of the Mass Media Bureau sent another letter to counsel for Dallas M. Tarkenton seeking additional information. See Attachment 2 hereto. Again the information requested had nothing whatsoever to do with Terry Jenks. Indeed, Terry Jenks, Gleamer Lee Smith, and their respective counsel were not even served with copies of the Mass Media Bureau's further request. Dallas Tarkenton responded to the request with additional information on December 17, 1992.

On February 10, 1993, the Chief of the Enforcement Division sent a final letter to Dallas M. Tarkenton. That letter, a copy of which is Attachment 3 hereto, states quite clearly that,

"The Commission is in receipt of your responses to official letters of inquiry.... The letters of inquiry were precipitated by concerns that Mr. Tarkenton abused the Commission's processes, was or is an undisclosed real party-in-interest in applications for broadcast facilities filed by or on behalf of one or more of his sons, or otherwise engaged in Commission-related misconduct.

Based on the information currently before the Commission, we find there is no warrant at this time for further action. Accordingly, this matter is hereby closed."

To the best of Jenks' knowledge, there has been no appeal from or request for review or reconsideration of this determination. The matter is, as the Bureau has stated, closed. Gradick's Motion did not provide any new evidence or offer any allegations that were not considered by the Mass Media Bureau in its year long investigation.

### **III. GRADICK'S CONDUCT CONSTITUTES AN ABUSE OF PROCESS**

#### **A. GRADICK WITHHELD RELEVANT INFORMATION**

Gradick's Motion falsely states that the Design Request for Commission Inquiry is pending and that there have been no determinations concerning the sufficiency of the allegations. As is clear from Attachments 1-3 hereto, Gradick's Motion falsely characterized the status of these matters at the Commission and withheld the information that the Commission had in fact investigated the allegations against Jenks, had found them to be unsubstantiated, and had closed its investigation. Gradick also withheld the fact that there was a second Petition for Reconsideration pending that had nothing to do with Terry Jenks

and that either or both Petitions could be granted without any adverse findings to Jenks.

On April 2, 1993, Gradick filed a Supplement to Motion to Modify Issues, one week after he filed his Motion. Therein Gradick states that,

"in regard to the Request for Commission Inquiry, it has been discovered that the Commission sent official letters of inquiry in this matter on January 29, 1992 and by FCC letter 1800 C4 dated February 10, 1993, the Commission elected not to pursue further action on the Inquiry. The Petition for Reconsideration remains pending at the Commission."

(Emphasis added.) This statement of Gradick's "discovery" does not correct the false assertions in the Motion. Significantly, Gradick's Supplement did not supply copies of the January 29, 1992 or February 10, 1993, letters or divulge that the Commission's Mass Media Bureau (before which the Petition for Reconsideration is pending) had examined the allegations of misconduct against Terry Jenks and had concluded that they were unsubstantiated.

On the contrary, Gradick in its Supplement deliberately conveyed the impression that these matters remain to be resolved when the staff acts on the Petition for Reconsideration. Gradick has not corrected his false statement that there have been no determinations concerning the sufficiency of the allegations, although Gradick has "discovered" proof that his statement is false. More importantly, even after having "discovered" the Mass Media Bureau's letters of January 29, 1992, and February 10,

1993, Gradick has not withdrawn his Motion, although Gradick has now "discovered" that according to the Mass Media Bureau the matter is now "closed." There is no justification for such conduct.

Gradick also has not explained how he mysteriously "discovered" these materials one week after his Motion was filed but not during the 30 day period in which he prepared his Motion.

**B. THERE WAS NO REASONABLE BASIS FOR THE MOTION**

Gradick acknowledged in its Motion that the Design Request for Commission Inquiry "is premised upon the same conduct that was alleged in the Petition for Reconsideration." Thus, Gradick must acknowledge that the Mass Media Bureau has already reviewed the allegations contained in the Petition for Reconsideration and found them to be unsubstantiated. After the Mass Media Bureau devoted more than a year to examining thoroughly the Design allegations and finding them to be unsubstantiated and no warrant for further action, there is absolutely no reason to believe that the Bureau would somehow now change its mind in acting upon the Petition for Reconsideration. Thus there was no reasonable basis for the Motion, even as supplemented.

In his Opposition to Motion to Modify Issues filed on April 7, 1993, and incorporated herein by reference, Jenks showed that Gradick had failed to demonstrate that any reasonable basis exists for adding a condition upon a grant of the Terry C. Jenks application. The matters that Gradick seeks to inject into this proceeding have already been fully investigated and resolved, although Gradick withheld these facts from the Commission.

In addition, as noted above, Gradick's "Motion to Modify Issues" did not request any issues and did not suggest modification of any issues. The Motion was clearly only a vehicle used by Gradick to cast suspicion on Jenks and to cause Jenks to expend additional resources in this hearing.



The absence of any reasonable basis for adverse allegations raised is another factor that has been long held to be a factor in determining whether an abuse of process has occurred. The Commission has held that, should it appear that allegations in a petition are specious, with little or no factual or legal basis, such evidence would tend to raise the question of whether the petitioner was acting in good faith. See Radio Carrollton, 69 F.C.C. 2d at 1151.

**C. AN ISSUE SHOULD BE ADDED TO EXAMINE GRADICK'S WILLINGNESS TO ABUSE THE COMMISSION'S PROCESSES**

A Commission licensee or applicant who participates in conduct abusive of the Commission's processes lacks the requisite character qualifications to be a Commission licensee. See, e.g., Radio Carrollton, 69 F.C.C. 2d 1139. As a result of Gradick's Motion and his refusal to withdraw his Motion even after he belatedly "discovered" there was no merit to his Motion, Jenks, the Bureau, and the Presiding Judge have been and will be forced to expend time and resources responding to the Motion.<sup>4</sup> The public interest is definitely not served by conduct such as Gradick's. Moreover, Gradick is an experienced broadcaster, who has participated in numerous applications before the FCC and is

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<sup>4</sup>With Jenks as his sole remaining competitor for Channel 288A at Bowdon, Gradick definitely had an economic motive for his conduct, a third factor in determining his obstructive intent. See Radio Carrollton, 69 F.C.C. 2d 1139, 1151-52 (1978), aff'd em. sub nom., Faulkner Radio, Inc. v. FCC, No. 79-1749 (D.C. Cir. Oct. 15, 1980), cert. denied, 450 U.S. 1041 (1981).

100% owner of a current licensee. He is or should be fully cognizant of the Commission's processes and policies.

Section 1.52 of the Commission's rules provides that the signature of an attorney "constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." 47 C.F.R. §1.52 (1992). See also American Television Relay, Inc., 11 F.C.C. 2d 553, 558 (1968). This section parallels Rule 11 of the Federal Rules of Civil Procedure. See Attorney Signature Requirements, 58 R.R.2d 130, 131 n. 3 (1985). The words "good ground to support it," language found in both Section 1.52 of the Commission's Rules and in Rule 11, require some prefiling inquiry into both the facts and the law. See Kinee v. Abraham Lincoln Federal Savings & Loan Ass'n., 365 F.Supp. 975, 982-83 (E.D. Pa. 1973).

It is clear that Gradick either failed to make a good faith prefiling inquiry before he filed his Motion, and thus recklessly made the statements he did, or that he made the statements about the status of matters knowing they were false. Certainly by the time Gradick filed the Supplement, however, he knew that statements made in the Motion were false, but he did not correct those statements or withdraw the Motion. Such conduct clearly constitutes an abuse of process.

IV. THIS MOTION SATISFIES THE REQUIREMENTS  
OF SECTION 1.229 OF THE RULES

A. TIMING

This Motion to Enlarge Issues is timely filed. This Motion

**C. DISCOVERY**


Pursuant to Section 1.229(e) of the Commission's Rules, Jenks requests that the Presiding Judge issue an order requiring Gradick to produce the following documents, according to the definitions and instructions in Attachment 5 hereto:

All documents, including correspondence, diary entries, time sheet entries, telephone records, and travel records that refer or relate to, concern, discuss, or reflect:

(a) all information known to Steven L. Gradick (Gradick) and his agents and/or representatives concerning the representations and allegations made by Gradick in his Motion to Modify Issues filed March 26, 1993, and/or his Supplement to Motion to Modify Issues filed April 2, 1993;

(b) all instructions or authorizations Steven L. Gradick has issued to any of his agents or counsel in connection with the Motion to Modify Issues or Supplement to Motion to Modify Issues;

(c) all support for and verification of the allegations and representations made by



Rasmussen as a result of information learned in the deposition of Steven L. Gradick.

**D. FORFEITURE**

Pursuant to Section 1.229(f) of the Rules, and the Prehearing Conference Order in this proceeding, Jenks has

considered whether he should request a fee shift in this case.

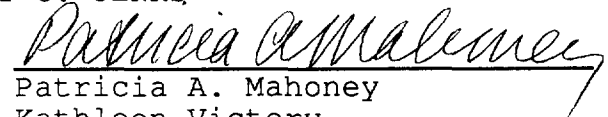
specified, and the Presiding Judge should consider whether other sanctions are appropriate.

WHEREFORE, for the foregoing reasons, it is respectfully requested that the issues in this proceeding be enlarged, as requested.

Respectfully submitted,

TERRY C. JENKS

By:

  
Patricia A. Mahoney  
Kathleen Victory

His Attorneys

FLETCHER, HEALD & HILDRETH  
1300 N. 17th Street, 11th Floor  
Arlington, Virginia 22209  
(703) 812-0400

April 9, 1993

ATTACHMENT 1

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

January 29, 1992

IN REPLY REFER TO:

GPS/7212

Certified Mail - Return Receipt Requested

John S. Neely, Esq.  
Miller & Miller, P.C.  
1990 M Street, N.W., Suite 760  
Washington, D.C. 20036

Dear Mr. Neely:

The Commission is in receipt of a Request for Commission Inquiry, filed September 26, 1991, by Design Media, Inc. ("Design"), and three opposition pleadings, filed by Terry C. Jenks ("Jenks"), Gleamer Lee Smith ("Smith"), and Dallas M. Tarkenton ("Tarkenton"). Design requests that the Commission commence a formal investigatory proceeding, pursuant to § 403 of the Communications Act of 1934, as amended, to determine whether Jenks, Smith and Tarkenton engaged in an abuse of the Commission's processes, and whether Tarkenton committed a violation of § 73.3513 of the Commission's Rules.

Background

Design is the licensee of Station WQUL(FM) (Channel 249A), Griffin, Georgia. In Rulemaking Proceeding MM Docket No. 90-309, Design requested that the Commission substitute Channel 248C3 for 249A at Griffin, and modify WQUL(FM)'s license to specify operation on the higher powered channel. In order to accomplish the upgrade at Griffin, Design also proposed to substitute Channel 288A for 248A at Hogansville, Georgia. However, Jenks and another entity, Bowdon Broadcasters, Inc. ("BBI"), independently filed counterproposals requesting the allotment of Channel 288A to Bowdon, Georgia, as that community's first local service.

Although BBI eventually dismissed its counterproposal in consideration for the payment of money by Design, Jenks continued to prosecute his counterproposal for the allotment of a new FM channel at Bowdon. In Report and Order, 6 FCC Rcd 4863 (1991), the Chief, Allocations Branch, determined that Jenks' counterproposal would better serve the public interest. As a consequence, Design's plan to upgrade WQUL(FM)'s facilities was frustrated. Subsequently, on September 19, 1991, Design filed a Petition for Reconsideration of the Report and Order. The



Petition for Reconsideration remains pending before the Chief, Allocations Branch.

### Design's Allegations

Design asserts in its Request for Inquiry that the information contained in its Petition for Reconsideration raises a prima facie case of fraud upon the Commission. In support, Design provides a Declaration of Michael Bergner ("Bergner"), an attorney and radio station broker who represented BBI in the allocation proceeding. Bergner states that the amount of money that Design was willing to pay BBI to dismiss its counterproposal would have been significantly greater had Jenks also agreed to settle. Following several unsuccessful attempts to contact Jenks by mail and telephone, Bergner, on September 22, 1990, traveled to Jenks' home to personally appeal to Jenks to dismiss his counterproposal. Although Jenks flatly refused to even consider settling, Bergner states that he learned that Jenks had filed his counterproposal at the suggestion of a long-time friend, Gleamer Lee Smith ("Smith").

Design states that the connection between Jenks and Smith provides a "crucial link" in a chain of facts, which, when taken together, establish a prima facie case that Jenks did not file his counterproposal for the legitimate purpose of ultimately applying for a construction permit for a new FM station. Rather, according to Design, Jenks filed his counterproposal to aid and abet Smith and Smith's business partner, Dallas M. Tarkenton ("Tarkenton"), in their efforts to prevent Design from upgrading WQUL(FM)'s facilities and/or to force Design to sell WQUL(FM) to Tarkenton at less than market value.

According to Design, before Jenks filed his counterproposal, Tarkenton threatened to file a counterproposal unless Design paid Tarkenton money. Design further argues that after Jenks filed his counterproposal, Tarkenton offered to buy WQUL(FM) and another Design-owned station for a price that was far less than the stations would be worth if WQUL(FM) were allowed to upgrade.

Design also claims that Tarkenton has a history of abusing the Commission's processes. According to a handwriting expert retained by Design, Tarkenton "in all probability" signed the applications and amendments for his son Stephen's application for a new FM station at Lafayette, Florida (BPH-870720MU). Design also claims that Tarkenton was the undisclosed real party in his son Christopher's application for a new FM in Hogansville, Georgia. See Memorandum Opinion and Order, FCC 90M-1469 (released June 4, 1990). Design further maintains that despite the fact that Tarkenton sold Stations WMKJ(FM) and WCOH(AM), Newnan, Georgia, to his son, Dallas III, in 1985, the stations continue to operate from the father's office in Athens, Georgia.